

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
	:	
of	:	
	:	
SNS BOILER CORPORATION,	:	DETERMINATION
JASON B. SCHWARTZ, AND	:	DTA NOS. 818703, 818704
STUART SCHWARTZ	:	AND 818705
	:	
for Revision of Determinations or for Refunds of Sales	:	
and Use Taxes Under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 1991 through August 31, 1997.	:	

Petitioners, SNS Boiler Corporation and Stuart Schwartz, 477 West Drive, Copiague, New York 11726, and Jason B. Schwartz, 997 Pacific Street, Lindenhurst, New York 11757, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1991 through August 31, 1997.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on April 22, 2002 at 10:30 A.M., with all briefs to be submitted by July 19, 2002, which date began the six-month period for the issuance of this determination. Petitioners appeared by Harry Helfield, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's use of an indirect audit method was reasonably calculated to reflect tax due.

II. Whether petitioner has established that reasonable cause exists so as to justify the waiver of penalties.

FINDINGS OF FACT

1. On November 16, 1998, the Division of Taxation (“Division”) issued to petitioner SNS Boiler Corporation (“SNS”) a Notice of Determination of sales and use taxes due for the period May 1, 1991 through August 31, 1997 in the amount of \$690,421.86, plus penalties pursuant to Tax Law § 1145(a)(1)(ii) and (vi) and interest. On December 17, 1998, the Division issued to each of the petitioners Jason B. Schwartz and Stuart Schwartz two notices of determination of sales and use taxes due for the periods June 1, 1991 through August 31, 1993 and June 1, 1995 through August 31, 1997, totaling tax due of \$383,154.05, plus penalty and interest, stating that petitioners were officers or responsible persons of SNS Boiler Corporation.¹

2. In September 1997, the Division commenced a field audit of petitioner’s business. SNS is located at 127 East Hoffman Avenue, Lindenhurst, New York and is in the business of repairing and servicing boilers. On September 22, 1997, the auditor sent a letter to petitioner scheduling a field audit of petitioner’s books and records pertaining to sales and use tax liability for the periods June 1, 1991 through August 31, 1993 and December 1, 1993 through May 31, 1997. The letter asked that the following records be made available for examination: financial statements; journals; ledgers; sales invoices; purchase invoices; cash register tapes; sales and use tax returns; Federal income tax returns; and exemption certificates. Following a meeting on March 6, 1998, the auditor gave petitioner a second written request for Federal corporate income

¹Petitioners Jason B. Schwartz and Stuart Schwartz do not contest the Division’s position that they were officers or responsible persons of SNS Boiler Corporation. Accordingly, unless otherwise indicated, all references to “petitioner” herein shall refer to SNS Boiler Corporation.

tax returns for the years 1990 through 1997, general ledgers for the period June 1, 1991 through May 31, 1997 and sales journals for the same period.

3. The only records provided to the auditor by petitioner were withholding and payroll records, ledgers, journals and bank statements for the period January 1, 1995 through November 30, 1995. A review of the Division's files indicated that petitioner filed sales and use tax returns only for the period September 1, 1993 through May 31, 1995.

4. Based on the lack of books and records, the auditor determined that a detailed audit would be impossible. Important to this determination was the fact that no source sales documents such as sales invoices were provided and that there was no documentation of tax collected or of taxable sales. The auditor decided to use the bank statements and corporation income tax returns on file with the Division to determine petitioner's taxable sales for the audit period.

In determining petitioner's taxable sales, the auditor allocated to the respective period to which it applied, the gross sales figures from the corporation's Federal income tax returns. For the period January 1, 1995 through November 30, 1995, the auditor used bank deposits as indicated on the statements to arrive at taxable sales. Where no records for particular quarters were available, the auditor estimated the taxable sales based on the gross sales shown on the Federal income tax returns. Audited taxable sales for the entire audit period were determined to be \$8,465,899.57, and by subtracting reported taxable sales of \$97,150.00, the auditor arrived at additional taxable sales for the audit period of \$8,368,749.57, and additional tax due of \$690,421.86.

Penalties were imposed by the auditor for petitioner's failure to maintain books and records and failure to report and pay the tax due. An additional penalty was imposed as a result

of the underreporting of tax due exceeding 25% of the amount of the taxes required to be shown on the returns for the audit period.

5. During the audit petitioner executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law which collectively extended to December 20, 1998 the date by which the Division could assess tax due for the period December 1, 1993 through November 30, 1995.

6. Based upon documentation produced at the Bureau of Conciliation and Mediation Services ("BCMS") conference, the auditor reduced the amount of tax due to \$436,055.10, plus penalty and interest.

CONCLUSIONS OF LAW

A. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division's estimating tax due (Tax Law § 1138[a]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment. The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109; *Matter of King Crab Rest. v. State Tax Commn.*, 134 AD2d 51, 522 NYS2d 978).

B. Petitioner received an audit appointment letter specifying the sales tax records requested for audit review. No sales invoices or other source documents to substantiate sales were provided to the auditor. Given the clear, written request for records, and the minimal response thereto by petitioner, it was entirely appropriate for the Division's auditor to conclude that conducting a detailed audit of petitioner's records to verify taxable sales and sales tax due would be impossible. Accordingly, the auditor's decision to go forward with an indirect auditing methodology and estimate sales tax due on the basis of external indices is sustained.

C. Where, as here, the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (*Matter of Ristorante Puglia, Ltd. v. Chu, supra*; *Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, 157, *cert denied* 355 US 869, 2 L Ed 2d 75). However, exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *aff'd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*).

D. At the BCMS conference, petitioner established that it had exempt sales during the audit period, thereby reducing the amount of tax due to \$436,055.10, plus penalty and interest. Pursuant to Tax Law § 1132(c), it is presumed that all of a vendor's sales are subject to the imposition of sales and use tax until the contrary is established, and the burden of proving otherwise is upon the vendor. Here, the corporation was required to maintain documentation to substantiate any exemption claimed on the sale of tangible personal property or services and to

present such documentation on audit (20 NYCRR 532.4[b][2], [4]). As no other documentation was presented by petitioner which established by clear and convincing evidence that the methodology used by the auditor was unreasonable or that the amount assessed was erroneous (*see, Matter of Sol Wahba, v. New York State Tax Commission, supra; Matter of Surface Line Operators Fraternal Org. v. Tully, supra*), no further adjustments to the amount of tax assessed are warranted. Petitioner's failure to produce an exemption certificate and source documentation that relates a particular sale to the exemption certificate must result in the denial of the claim for exemption (*Matter of Jack W. Miller Excavating Contractor v. State Tax Commission*, 131 AD2d 902, 516 NYS2d 352).

E. In regard to the Division's estimation of petitioner's sales taxes for the period at issue due to the lack of books and records provided by petitioner to the auditor, such method of calculation was reasonable, as petitioner's claim that its records had been taken and were in the possession of a previous accounting firm was not sufficient to establish that the Division's action was arbitrary and capricious (*Giordano v. State Tax Commission, State of New York*, 145 AD2d 726, 535 NYS2d 255).

F. Section 1145(a)(1)(i) authorizes the imposition of penalty for the failure to file a return or pay over the sales and use taxes due within the time required. Section 1145(a)(1)(vi) of the Tax Law authorizes the imposition of penalty upon a taxpayer for its omission from the total amount of sales and use taxes required to be shown on a return an amount which is in excess of 25 percent of the amount of such taxes required to be shown on the return. The commissioner may abate all penalty, pursuant to section 1145(a)(1)(iii), when it is determined that such omission was due to reasonable cause and not due to willful neglect. Petitioner bears the burden of establishing that there was reasonable cause, and not willful neglect, for the failure to report

and pay the taxes in question (*Matter of F & W Oldsmobile, Inc. v. State Tax Commn.*, 106 AD2d 792, 484 NYS2d 188; *Matter of East End Student Transportation Corp.*, Tax Appeals Tribunal, March 26, 1992). Here, the record is devoid of any facts which establish reasonable cause for petitioner's failure to pay the tax due. There is no basis to abate the penalty without such grounds.

In fact, the record establishes that petitioner was guilty of willful neglect in its reporting of sales and use taxes. The business failed to maintain adequate records for purposes of verifying taxable sales. Penalties cannot be waived where a taxpayer's failure to maintain accurate records resulted in underreporting of sales and use tax due (*Matter of Rosemellia* , Tax Appeals Tribunal, March 12, 1992; *Matter of Lima Florists*, Tax Appeals Tribunal, December 15, 1988). A substantial discrepancy between the sales tax reported on the returns and the sales tax found to be due is sufficient to sustain the penalties assessed (*Matter of S.H.B. Supermarkets v. Chu* , 135 AD2d 1048, 522 NYS2d 985). During the instant audit period, petitioner failed to file sales tax returns for the periods June 1, 1991 through August 31, 1993 and June 1, 1995 through August 31, 1997. The corporation reported taxable sales of \$97,150.00 while the Division on audit determined taxable sales to be \$8,465,899.57, a discrepancy of \$8,368,749.57. Petitioner's failure to maintain accurate records and the large deficiency resulting from the current audit are evidence of willful neglect and dictate against waiver of the penalties herein.

G. The petitions of SNS Boiler Corporation, Jason B. Schwartz and Stuart Schwartz are denied, and the notices of determination dated November 16, 1998 and December 17, 1998, as modified by the Bureau of Conciliation and Mediation Services, are sustained.

DATED: Troy, New York
December 5, 2002

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE